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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1450

A/S J. LUDWIG MOWINCKELS REDERI,

Petitioner,

—against—

DOW CHEMICAL COMPANY and DOW CHEMICAL INTERNATIONAL, S.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

The Petitioner, A/S J. Ludwig Mowinckels Rederi respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the State of New York entered in this proceeding on January 22, 1970.

Opinions Below

The opinion of the Court of Appeals for the State of New York, reported, 25 N. Y. 2d 576, appears in Appendix C hereto. One Justice dissented and voted to reverse on

the dissenting opinion at the Appellate Division. The majority opinion of the Appellate Division of the Supreme Court of New York, First Department (reported at 31 A.D. 2d 372) is printed in the Appendix hereto, pp. 7a-10a. The dissenting opinion by Mr. Justice Steuer of the Appellate Division (reported at 31 A.D. 2d 374) is printed in the Appendix, pp. 10a-12a. The opinion of the Supreme Court, New York County, is printed in the Appendix at pp. 1a-6a. It is not officially reported.

Jurisdiction

The opinion and judgment of the Court of Appeals for the State of New York was entered on January 22, 1970. Jurisdiction of this Court is invoked under 28 U.S. Code § 1257(3).

Question Presented

The question presented in this petition is whether a state court may refuse to apply a remedy granted to suitors under its own state arbitration statute on the ground that the contract involved is a maritime contract, and thereby within the concurrent jurisdiction of the Federal Arbitration Act.

Statutory Provisions Involved

U.S. Carriage of Goods by Sea Act, 46 U.S. Code § 1303(6):

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered * * *"

New York Civil Practice Law and Rules:

Rule 7502(b):

> "Limitation of time. If, at the time that a demand for arbitration was made or a notice of in-

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tention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503."

Rule 7503(b):

"(b) Application to stay arbitration. • • • a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502."

Federal Judiciary Act, 28 U.S. Code § 1333:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" (Italics added.)

Federal Arbitration Act:

9 U.S. Code § 2:

"§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any

part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (July 30, 1947, ch. 392, 61 Stat. 670.)"

9 U.S. Code § 3:

"§ 3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (July 30, 1947, ch. 392, 61 Stat. 670.)"

9 U.S. Code § 4:

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in

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a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an

agreement for arbitration was made in writing and that there is a default in proceeding thereunder the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. (July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)"

Statement of the Case

Petitioner is a Norwegian corporation which owns the tankers Grena, Borga, and Strinda (Record p. A11). On December 1, 1964, in New York City, petitioner and respondents entered into a contract described as a "Tanker Voyage Charter Party" (Record p. A20). The contract provided for the carriage of various parcels of chemicals from Freeport, Texas to Rotterdam, The Netherlands, over a period of three years.

The contract contained an arbitration clause reading in its pertinent part as follows:

> "*Arbitration Clause:* Any dispute arising during execution of this Charterparty shall be settled in New York, Owners and Charterers each appointing an Arbitrator Merchant or Broker—and the two thus chosen, if they cannot agree, shall nominate their Arbitrator—Merchant or Broker—whose decision shall be Final. • • • For the purpose of enforcing awards this agreement shall be made a Rule of Court.
>
> • • •

The contract also contained the following provision:

> "23(b) The Owner and the Vessel in all matters arising under this Charter Party or any bill of lading issued hereunder shall be entitled to the like privileges, rights, and immunities as are contained

in Sections 3(6), 4 and 11 of the Carriage of Goods by Sea Act of the United States approved April 16, 1936."

Under the contract, the respondents made three shipments of ethylbenzine on three different occasions on three different vessels. The first was made on or about October 27, 1965, on the Norwegian tanker Grena (Record p. A13). The second was made on the Norwegian tanker Borga on June 12, 1966 (Record p. A15). The third was made on the Norwegian tanker Strinda on the 7th day of August, 1966 (Record p. A17).

In each of the shipments the respondents have made a claim for cargo damage (Record pp. A14, 16, 18).

All three cargo damage claims were denied by the petitioner on the ground that they were time-barred under the U.S. Carriage of Goods by Sea Act, 46 U.S.C. §1303(6) (Record pp. A14, 16, 18). Nothing was done to enforce these claims until after the one year time for suit had expired (Record p. A14). No suit was ever brought on any of the claims (Record p. A4).

On September 4 and 5, 1968, long after the expiration of the one year time period, the respondents demanded arbitration under the charter party and appointed an arbitrator (Record pp. A14, 16, 18). Petitioner then brought this proceeding in the New York State Courts to permanently enjoin the arbitration as time-barred under the New York Arbitration Law, CPLR Rule 7502(b), quoted *supra*, p. 2.

The Decisions Below

The majority of the Justices in the Appellate Division and the Justice in Special Term Part I held that the New York Arbitration Law did not apply to this contract because it was a maritime contract. They held that

the Federal Arbitration Act excluded the State Acts from being applied to maritime contracts. The majority said the Federal Arbitration Act "controls." Therefore, according to these Justices, a New York state court must look to the Federal Arbitration Act and the Federal decisions under it and apply them to this case as if they were state law. The New York Court of Appeals, one Justice dissenting, adhered to this view.

The dissenting Justices would have granted the stay requested under state law, reasoning that the Federal Arbitration Act does not impose on the state courts the necessity of adhering to its provisions and the Federal decisions interpreting it.

Reasons for Granting the Writ

1. *The Decision Below Conflicts with Decisions of this Court and the Federal Judiciary Act. 28 U.S.C. §1333.*

The New York Court of Appeals decided against the petitioner in this case on the ground that a party in a maritime case should not be permitted to come into the state courts to avail itself of a remedy not available to it in the Federal courts. This is exactly the position taken once before by the New York Court of Appeals and wholly rejected by this Court.

In *Matter of Red Cross Line* v. *Atlantic Fruit Co.*, 233 N. Y. 373, (decided 1922), the New York Court of Appeals held that a shipowner could not compel a charterer to arbitrate under the New York State Arbitration Act because the agreement was a maritime contract, and in the Federal courts at that time there was no arbitration act and such an arbitration clause could not be specifically enforced.

The Supreme Court of the United States, however, in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, (1924)

reversed, and held that a state may properly confer upon its courts jurisdiction governing arbitration agreements under the Federal Constitution and the Judicial Code, Section 24 (the predecessor of 28 U.S.C. §1333).

This Court said at pages 123, 124:

> "By reason of the saving clause, state courts have jurisdiction *in personam*, concurrent with the admiralty courts of all causes of action maritime in their nature arising under charter parties. Judiciary Act of September 24, 1789, c. 20, §9, 1 Stat. 73, 77; Judicial Code §24 par. 3; *Leon* v. *Galceran*, 11 Wall. 185; *Schoonmaker* v. *Gilmore*, 102 U. S. 118; Chappell v. Bradshaw, 128 U. S. 132; *DeLovio* v. *Boit*, 2 Gall 398, 475. The 'right of a common law remedy,' so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the States in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais*, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 644, *et seq.*; *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303. A state may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction. The *Hine* v. *Trevor*, 4 Wall. 555; *The Glide*, 167 U. S. 606. But otherwise, the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. New York, therefore, had the power to confer upon its courts the authority to compel parties within its

> jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the State, which is contained in a contract made in New York and which, by its terms, is to be performed there."

Likewise, New York has power to confer upon its courts the authority to stay parties from arbitrating claims time-barred under the general maritime law.

The *Red Cross Line* case has continuously been approved by this Court.

See *Panama RR* v. *Vasquez*, 271 U. S. 557, (1926), *Marine Transit Co.* v. *Dreyfus*, 284 U. S. 263, (1932), *Madruga* v. *Superior Court*, 346 U. S. 556, (1953), and *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, (1959).

In the latter case, this Court said at pages 373, 374:

> "Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulations of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. • • • *state laws governing the specific performance of arbitration agreements*, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even at

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times, when they conflicted with a rule of maritime law which did not require uniformity. 'In the field of maritime contract,' this Court has said, 'as in that of maritime torts, the National Government has left much regulatory power in the States.' Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Martime law is not a monistic system. The State and Federal Government jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history. This sharing of competence in one aspect of our federalism has been traditionally embodied in the saving clause of the Act of 1789." (Italics added.)

The Federal Arbitration Act, passed February 12, 1925, Chapter 213, 43 Stat. 883, contains fourteen sections which are now codified in Title 9, U. S. Code. This Act merely creates a federal remedy which exists concurrently with the state-created remedies. It does not control proceedings in the state courts. This statute makes specific reference to proceedings in the United States District Court, see sections 3 and 4, quoted *supra*, pp. 4, 5.

Proceedings in the state courts are not referred to, and there is no statement anywhere in the act that it provides an "exclusive" remedy to litigants.

The Legislative History confirms that the Federal Arbitration Act was intended to be applicable to Federal courts only. H. R. Report No. 96, 68th Cong. 1st Session, states page 1:

> "The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding

> is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential. • • •"

The New York Court of Appeals in this case deprives maritime litigants of their statutory right to a state remedy under the "saving to suitors" clause of 28 U.S.C. §1333.

The Federal Aribtration Act should not be construed so as to deprive persons of rights under other statutes. *Wilko* v. *Swan*, 346 U. S. 427.

The intent of the Federal Arbitration Act to apply only to Federal courts has been confirmed by this Court in the recent case of *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, (1967). In that case, the Act is described as follows at page 400:

> "• • • Section 4 provides a *federal remedy* for a party 'aggrieved by the alleged failure, neglect, or refusal by another to arbitrate under a written agreement for arbitration,' and directs the *federal court* to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored.' (Italics added.)

The majority opinion states at page 404:

> "• • • the question is whether Congress may prescribe how *federal courts* are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate." (Italics added.)

The dissenting opinion, written by Mr. Justice Black, comments more directly on the role of state arbitration

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laws (on this point the majority was in harmony) at page 420 and its footnote 23:

> "Finally, there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts.[23] * * *"
>
> "[23] See, e.g., *Cohen & Dayton,* [12 Va. Law Rev.], at 277; *Committee on Commerce, Trade & Commercial Law,* [11 A.B.A.J.], at 155, 156. Mr. Rose, representing the Arbitration Society of America, suggested that the Act might have the beneficial effect of encouraging States to enact similar laws, *Joint Hearings,* [on S 1005 and H. R., 646, 68th Cong. 1st Sess.], but Mr. Cohen assured Congress:
>
> 'Nor can it be said that the Congress of the United States, directing its own courts * * *, would infringe upon the provinces or prerogatives of the States * * *. [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced * * *. There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.' *Id.,* at 39-40."

This Court rejected the broad dictum of the Second Circuit Court of Appeals in *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.,* 271 F. 2d 402, to the effect that the Federal Arbitration Act created "national substantive law" and should therefore be applied in state courts.

Mr. Justice Harlan wrote a separate opinion reading as follows, page 407:

> "In joining the Court's opinion I desire to note that I would also affirm the judgment below on the

basis of *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402."

Mr. Justice Harlan was alone in this view.

In his dissent, Mr. Justice Black said at page 424:

> "The Court here does not hold today, as did Judge Medina, that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect—which the Court seems to leave up in the air—would flout the intention of the framers of the Act."

In the present case, the New York Court of Appeals revives the concept of a "national substantive law" applicable to state courts as well as Federal courts. It states that its decision is made in the interest of "nationwide uniformity in the interpretation and application of arbitration clauses in foreign and interstate transactions." It strikes down its own state statute to achieve that purpose.

The New York Court of Appeals relies upon *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956), and reasons that the case before it is like a case in Federal court under diversity jurisdiction. This reasoning overlooks the "highly intricate interplay of the states and National Government in their regulation of maritime commerce", and the fact that "the source of law in saving-clause actions cannot be described in absolute terms." *Romero* v. *Int. Term. Operating Co., supra.*

In maritime cases the parties are permitted to pursue whatever state court "remedies" are available. This includes obtaining jury trials in admiralty cases which would be tried without a jury in Federal court, compelling arbitrations where state law provides remedies to compel them and, as in this case, staying arbitration where permitted by state law.

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2. *The Decision Below, in Denying the Use of a State Arbitration Act to a Litigant has Far-Reaching Effects Detrimental to Other Litigants.*

The relationship between Federal and state arbitration law has been before this Court three times previously. *Red Cross Line* v. *Atlantic Fruit Co., supra* p. 8, *Bernhardt* v. *Polygraphic Co., supra* p. 14, *Prima Paint* v. *Flood & Conklin, supra* p. 12. Never before, however, has this Court passed upon the question of whether a state court must apply Federal Arbitration Law in its own courts when a case is brought under its own state arbitration law.

Many differences exist between state arbitration acts and the Federal Act. In some states no provision exists to compel specific performance. The Federal Act applies to contracts "evidencing a transaction involving commerce" as well as to maritime contracts. 9 U.S.C. §2. If this decision stands, whenever suit is brought on such contracts in a state having no arbitration law, the state court may have to apply Title 9, U. S. Code §3, *supra,* and stay the action pending arbitration. Likewise, in a state with a more progessive state statute, its law will be effectively amended to conform to the provisions of the Federal Act. This construction of the Federal Arbitration Act is, obviously, contrary to the intent of Congess, and to the decisions of this Court.

Arbitration clauses are common in maritime contracts and widely used in sales agreements, labor contracts, and other non-maritime contracts. The effect of this decision is not limited to maritime contracts. The number of contracts it will affect cannot be estimated.

Also of concern to many litigants, and never passed upon by this Court, is whether arbitrators should be permitted to decide a dispute which is time-barred. The one-

year limitation involved here is one which "extinguishes the cause of action itself, and not merely the remedy." *M.V.M. Inc.* v. *St. Paul Fire & Marine Ins. Co.*, 156 F. Supp. 879 (1957).

The legislature of New York has recognized that parties to arbitration agreements should be protected from the circumvention of time-bar statutes by the bringing of time-barred controversies before lay arbitrators.

Arbitrators are expected to decide controversies in accordance with the law, and this Court has recognized that an award should be set aside for "manifest disregard of law." *Wilko* v. *Swan, supra,* at p. 436. Accordingly, the result in this case should be the same whether brought in court or before arbitrators, but the respondents, nevertheless, must have anticipated when they demanded arbitration that the lay arbitrators would ignore the time-bar.

The New York Court of Appeals attacks a straw man in calling this an "offensive form of forum shopping." The New York legislature provided a remedy it believed fair to litigants. CPLR §7502(b) supra. The U. S. Congress permits litigants to utilize state court remedies. 28 U.S.C. §1333, *supra.* The petitioner here, and all others in its same position, should be entitled to use that remedy.

Approximately four weeks after the decision in this case, the New York Court of Appeals decided *Matter of Vigo Steamship Corporation* (*Marship Corp.*), as yet unreported, reversing the Appellate Division's opinion, reported 32 A. D. 2d 10. That case involved the granting under state law of an order consolidating two arbitrations arising out of maritime contracts, a procedure not sanctioned by the Federal Arbitration Act. The Court said in its opinion:

> "* * * Although the contracts among the parties concededly involved maritime matters, the sole issue

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involved in the proceeding below in a state court was procedural in nature and its resolution is not in any way determinative of the outcome of the disputes on the merits since it merely involves the question whether two, rather than one, arbitration proceedings are to be used to decide common issues. (Cf. *Matter of A/S J. Ludwig Rederi,* 25 NY 2d 76 [decided Jan. 22, 1970]. It is clear therefore, that the provisions of the CPLR are applicable to the present controversy and there is no basis upon which to predicate a holding that federal law controls. * * *"

This decision, (opinion by Burke, J. who dissented in the present case) is directly contrary to the decision in the present case, and cannot be distinguished as the Court attempts.

We understand that an appeal is being taken to this Court in that case under Title 28 U. S. Code §1257(2). If that case is heard by this Court, it is an additional reason to grant certiorari in the present case.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the State of New York.

Dated: New York, N. Y.
April 20, 1970

Respectfully submitted,

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APPENDIX A

Opinion of Special Term Part I

MEMORANDUM DECISION

SUPREME COURT
NEW YORK COUNTY,
Special Term, Part I.

[SAME TITLE]

ARTHUR MARKEWICH, J.:

The petitioner moves pursuant to CPLR Section 7502 (b) for an order staying arbitration on the ground the claims sought to be arbitrated would have been barred by limitation of time had they been asserted in a court of the State of New York. It is conceded no suit was commenced nor arbitration demanded within one year from delivery of cargo in each instance.

These parties engaged in a Charter Party which contained the following provisions:

> "10. In case of arbitration, the arbitration clause as per London Form of Charter to apply to this Charter Party, but arbitration to take place in New York.
>
> • • •
>
> *Arbitration Clause*: Any dispute arising during execution of this Charterparty shall be settled in New York, Owners and Charterers each appointing

an Arbitrator Merchant or Broker—and the two thus chosen, if they cannot agree, shall nominate a third Arbitrator—Merchant or Broker— whose decision shall be final. Should one of the parties neglect or refuse to appoint an Arbitrator within twenty-one days after receipt of request from the other party, the single Arbitrator appointed shall have the right to decide alone, and his decision shall be binding on both parties. For the purpose of enforcing awards this agreement shall be made a Rule of Court."

"23. LIMITATION OF LIABILITY. (a) Any provision of this Charter to the contrary notwithstanding, the Owner shall have the benefit of all limitations of, and exemptions from, liability accorded to the owner or chartered owner of vessels by any statute or rule of law for the time being in force. Nothing in this charter shall operate to limit or deprive the Owner of any statutory exceptions or limitation of liability on the theory of personal contract or otherwise.

(b) The Owner and the vessel in all matters arising under this Charter Party or any bill of lading issued hereunder shall be entitled to the like privileges, rights and immunities as are contained in Sections 3 (6), 4 and 11 of the Carriage of Goods by Sea Act of the United States approved April 16, 1936."

The Carriage of Goods by Sea Act provides in Section 3 (6) thereof:

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after

> delivery of the goods or the date when the goods should have been delivered • • •"

It provides also in paragraph 23 (b) thereof:

> "The Owner and the vessel in all matters arising under this Charter Party or any bill of lading issued hereunder shall be entitled to the like privileges, rights, and immunities as are contained in Sections 3 (6), 4 and 11 of the Carriage of Goods by Sea Act of the United States approved April 16, 1936."

In each instance a bill of lading was issued which provides

> "If this Bill of Lading is a document of title to which the Carriage of Goods by Sea Act of the United States approved April 16, 1936, or similar legislation giving statutory effect to the International Convention for the Unification of Certain Rules relating to Bills of Lading at Brussels of August 25, 1924, applies by reason of the port of loading or discharge being in territory in which the said Act or other similar legislation is in force, this Bill of Lading shall have effect subject to the provisions of the said Act or other similar legislation, as the case may be, which shall be deemed incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act or other similar legislation. • • •"

Petitioner argues that the asserted claims would be subject to bar by limitation if asserted in a Court of this State, that the claims arise out of bills of lading and

suits under those bills would be time-barred, and Clause 23 (b) of the Charter Party extends the one year limitation to bring suits to arbitration as well as suits in courts of law. Respondents argue that the shipments in foreign commerce are covered by the Federal Arbitration Act which declares national substantive law that prevails over contrary state law and rules. Thus in *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402, the Court stated:

> "We, therefore, hold that the Arbitration Act in making agreements to arbitrate 'valid, irrevocable, and enforceable' created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists. We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two types of legal questions are inextricably intertwined.
>
> • • •
>
> "We note that were we compelled to apply New York law to the problems involved in this case, we would have been forced to arrive at a contrary conclusion. Had this not been so, we would not have given such detailed consideration to the choice of the applicable law. But the pattern and substance

of New York law appear to be different than what we have found the federal law to be."

In this light it is of no significance whether under the Charter Party, the Bill of Lading or the Carriage of Goods by Sea Act, this proceeding is a suit or arbitration. Petitioner insists that under statute, contract and decisional law it is entitled to rest on the one year limitation in either case while respondent insists the limitation is in respect of suits only and not arbitration. The irrelevance springs from the fact that arbitration has been demanded which is one governed by the Federal Arbitration Act. It provides in part (9 U.S.C.A. §3):

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * *"

Thus in *Lowry & Co.* v. *S. S. LeMoyne D'Iberville,* 253 F. Supp. 396, it was stated:

> "* * * The court having found the existence of a valid arbitration provision, all other issues including,

but not limited to interpretation and limitations are for the arbitrators and not the court."

Indeed, it is questionable in any case whether under CPLR 7502 the issue of limitation is determinable by this Court as an issue preliminary to arbitration. That section is entitled: "Application to the court; venue; statutes of limitation." If a contract limitation is involved petitioner urges the contract includes and makes reference to Federal statutes imposing a one year limitation. If a statute of limitation is involved it is questionable if the Legislature intended that such statutes may be either state or federal. In any case, the final question is the forum in which the proposed preliminary issue is to be raised and determined. This is necessarily an arbitration involving foreign commerce and therefore federal substantive law under the federal arbitration act which leaves the issue to the arbitration, though this arbitration is pending here.

The motion is denied.

Filed Oct. 15, 1968

Co. Clerk's Office

New York

Dated: October 11, 1968.

A. M.
J.S.C.

APPENDIX B

Opinion of the Appellate Division

SUPREME COURT.
APPELLATE DIVISION—FIRST DEPARTMENT.

February 1969

Louis J. Capozzoli, J. P.,
Emilio Nunez,
James B. M. McNally,
Aron Steuer,
Earle C. Bastow, JJ.

IN THE MATTER

of

The Petition under CPLR §7503(b) and §7502(b) of A/S J. LUDWIG MOWINCKELS REDERI,

Petitioner-Appellant,

to stay arbitration demanded by DOW CHEMICAL COMPANY and DOW CHEMICAL INTERNATIONAL, S. A.,

Respondents-Respondents.

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Appeal from order of the Supreme Court at Special Term (Arthur Markewich, J.) entered October 15, 1968 in New York County, which denied a motion for a stay of Arbitration.

Appendix B

R. Glenn Bauer of counsel (M. E. DeOrchis and Thacher W. White with him on the brief; Haight, Gardner, Poor & Havens, attorneys) for petitioner-appellant.

Gray Williams of counsel (George B. Warburton with him on the brief; Hill Rivkins Warburton McGowan & Carey, attorneys) for respondents.

McNALLY, J.:

On December 1, 1964, petitioner and respondents entered into a written agreement whereby petitioner agreed to furnish tankers for the carriage of chemicals. The contract provides petitioner shall be entitled to the privileges, rights and immunities contained in Sections 3(6), 4 and 11 of the Carriage of Goods by Sea Act ("Act"). The Act provides the carrier shall be discharged from all liability unless suit is brought within one year after delivery of the goods. The contract also provides for arbitration of any dispute arising during the execution of the charter party. Respondents assert claims in regard to various shipments allegedly delivered more than one year prior to the making of the claims. Petitioner contested the claims and respondents demanded arbitration. Thereupon petitioner instituted this proceeding for a stay of arbitration under CPLR 7502(b) on the ground that the claims were untimely.

CPLR 7502(b) provides:

> "If, at the time that a demand for arbitration was made or a notice to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration * * *."

Appendix B

Respondents contend for the application of the Federal Arbitration Act (9 U. S. C. A. §3), which provides:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. • • • The court shall hear the parties, and upon being statisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. • • •"

CPLR 7502(b) enables the Court to pass on the alleged time limitation. However, the Federal Arbitration Act limits the court to the issues of the making of the agreement and the failure to comply with it. (*Prima Paint* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 404; *United States of America, etc.*, v. *CIO Noviera Continental, SA*, 202 F. S. 698, 700.) If the Federal Arbitration Act controls, we do not reach the issue of time limitation.

It cannot be gainsaid that the agreement and the provision for arbitration are maritime contracts. The Federal Arbitration Act applies to "any maritime transaction or • • • a transaction involving commerce." (9 U. S. C. A. §2.) The Act is based on the exclusive federal power over interstate commerce and over admiralty.

(*Prima Paint* v. *Flood & Conklin, supra,* at 405.) It has been held that the Federal Arbitration Act creates national substantive rights governed by federal and not state law. (*Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.,* 271 F. 2d 402, 409, *cert. granted* 362 U. S. 909, *dismissed* 364 U. S. 801.) It therefore follows that the Federal Arbitration Act controls, and the issue of time limitation is to be decided in arbitration.

Accordingly, the order denying a stay of arbitration should be affirmed, with costs.

All concur except Steuer, J., who dissents in a dissenting opinion.

DISSENTING OPINION OF THE APPELLATE DIVISION.

STEUER, J. (dissenting):

On this application for the stay of an arbitration the very narrow question presented is whether the applicable procedure is that provided for in the CPLR or that set out in the Federal Arbitration Act. Under the former, limitations is a preliminary question to be decided by the court (CPLR 7502[b]); under the latter, it is a matter for the arbitrators (Federal Arbitration Act [9 U. S. C. A. §3]; *Lowry & Co.* v. *S. S. LeMoyne D'Iberville,* 253 F. Supp. 396, 399.) Special Term decided that the Federal Act applied and hence did not reach the question of whether the claims are timely. Nor is that question here considered.

The matter sought to be arbitrated arises out of several claims for damage to merchandise during voyages at sea. The contract involved is designated a "Tanker Voyage Charter Party." On two grounds, namely, that

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the contract is maritime, and that it involves foreign commerce, jurisdiction over the disputes emanating under it would be in the Federal courts. However, it is indisputable that Congress has given the state courts concurrent jurisdiction where the remedy sought is *in pais* and does not constitute an inroad on a harmonious system (*Romero* v. *International Term. Co.,* 358 U. S. 354, 373). This includes the right of a state court to compel arbitration in such matters (*Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, reversing 233 N. Y. 373). When the *Red Cross* case was decided, there was no Federal Arbitration procedure and the arbitration therein ordered was according to state law.

After enactment of the Federal Arbitration Act, an action arose in the United States courts for fraud in the inducement of a contract involving interstate commerce. A motion to stay the action pending arbitration was denied in the District Court on the ground that as Federal jurisdiction depended on diversity, the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, requiring Federal courts to follow state law in such cases applied; and according to the law so applicable, the validity of the contract (whether or not induced by fraud) must first be determined by the court. The Circuit Court of Appeals reversed (*Robert Lawrance Co.* v. *Devonshire Fabrics, Inc.,* 271 F. 2d 402), holding that the Federal Arbitration Act created national substantive law which was to be applied in all cases where arbitration could be had under the Act. This holding was followed in *Prima Paint Corporation* v. *Flood & Conklin Mfg. Co.,* 360 F. 2d 315. However, when the latter case reached the Supreme Court, that Court, though affirming, specifically refused to adopt the *Lawrence* rule. The Court held (388 U. S. 395) that Congress could and did enact a law govern-

ing arbitration in the Federal courts, which included freeing the courts of any restrictions based on the *Erie* rule. However, the broader rule which imposed on the state courts the necessity of adhering to the Federal Act in state court arbitrations was not adopted. This is pointed up by the fact that one justice who urged that the *Lawrence* rule be confirmed stood alone (*Prima Paint* v. *Flood & Conklin, op. cit.*, 407).

The consequence is that procedure in arbitration in a state court is unaffected by the Federal Arbitration Act and remains what it was before that law was enacted, namely, governed by state law.

The order entered October 15, 1968, should be reversed on the law and the matter remanded to Special Term for further proceedings.

APPENDIX C

Opinion of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

1. No. 344. 69

In the Matter of

the Petition of A/S J. Ludwig Mowinckels Rederi,

Appellant,

To stay arbitration demanded by Dow Chemical Company & ano.,

Respondents.

FULD, CH. J.:

Dow Chemical and Dow Chemical International (respondents herein) are entitled to arbitration under the Federal Arbitration Act (F.A.A.). Under that statute, since there is a valid arbitration agreement, all other issues, including the issue of time limitations, are for the arbitrators and not the court.

The underlying controversy between the parties—arising as it does from a charter party, a maritime contract—is solely Federal in character and governed exclusively by Federal substantive law. This being so, the petitioner-appellant should not be permitted to come into our State courts and here institute a proceeding to enjoin enforcement of the arbitration provisions contained in the con-

tract, on grounds concededly unavailable under Federal law. This consideration, in and of itself, is sufficient to dispose of the appeal and to require an affirmance.

However, we turn, first, to the question whether or not we are required by *Prima Paint* v. *Flood & Conklin* (388 U.S. 395) to apply the Federal Arbitration Act in deciding this case. We are inclined to the view that we are, that in a case, such as the present—involving as it does a maritime transaction—*Prima Paint* mandates application of the Federal statute in state courts as well as in Federal courts.

It is particularly important to apply Federal law in the present case, for, to hold otherwise would (1) permit, indeed encourage, forum shopping; (2) prevent and undermine the need for nationwide uniformity in the interpretation and application of arbitration clauses in foreign and interstate transactions; and (3) permit individuals to circumvent the national law relating to arbitration agreements as called for by the F.A.A.

The charter party, from which the present controversy stems, contains an exceedingly broad arbitration clause in which the parties agreed to submit all of the questions arising out of the contract to arbitration. Accordingly, when agreement could not be reached, the respondents demanded arbitration. The appellant, though it recognized and acknowledged that the rights under the charter party are governed by Federal law, came into our State court and moved to stay the arbitration—pursuant to CPLR 7502(b)—on the ground that the disputes are time barred under the Federal Carriage of Goods by Sea Act (U.S. Code, tit. 46, §1303[b]). In opposing the application, respondents claimed that, since the disputes arise from a maritime contract, the F.A.A. governs and that, under

that statute, once the arbitration clause itself is found to be valid, all questions, including that having to do with a time limitation, must be left to the arbitrators for ultimate decision.

Both courts below, noting that the agreement and its provision for arbitration are governed by Federal law, held that the F.A.A.—"based on the exclusive federal power over interstate commerce and over admirality" (31 A D 2d 372, 373)—controls and that, under that statute, a time limitation may not be invoked to prevent arbitration. The appellant asks us to reach a contrary conclusion, primarily because it believes that the Supreme Court in its opinion (*per* Fortas, J.) in *Prima Paint* (388 U.S. 395, *supra*), required that the F.A.A. be applied only in the Federal courts.

The arbitration clause with which we are concerned is in a *maritime* charter party and it is important to emphasize, at the outset, that it is Federal subtantive law exclusively which controls such an agreement. The Federal Judiciary Act vests the district courts of the United States with original jurisdiction over all admiralty and maritime cases (U.S. Code, tit. 28, §1333). Although it provides that suitors may also pursue their remedies in the state courts, it is settled that, despite this grant of concurrent jurisdiction, the state courts are bound to apply Federal law in such disputes in order to secure a single and uniform body of maritime law. (See, e.g., *Detroit Trust Co.* v. *The Barlum*, 293 U.S. 21, 43; *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244-246; *Romero* v. *International Term. Co.*, 358 U.S. 354). In other words, although the saving clause in the statute permits actions under Federal maritime law to be brought in any state court, that court cannot limit the substantive rights of parties, nor can it apply its own rules of pro-

cedures if those rules would significantly affect the result of the litigation, i.e., would be "outcome determinative." (See, e.g., *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109).

The appellant takes the position that CPLR 7502(b)—which permits a court to stay arbitration if the dispute is barred by a limitation of time—does not substantially alter any federally created substantive rights. Its argument is permised upon the assumption that arbitration is a mere procedural device and that any court is free to prevent enforcement of an arbitration clause according to the particluar law of the forum. This is refuted by section 2 of the F.A.A. itself, which provides that a written provision for arbitration "in any *maritime transaction* or a contract evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Here, in unmistakable language, is evidence of the Congressional design that the arbitration clause in a maritime contract accords a Federal right to arbitration as a matter of Federal law, wholly apart from any provisions of the CPLR. Quite obviously a state court which prevents arbitration on a ground not recognized under Federal law denies the full measure of enforceability provided for by the F.A.A. to arbitration clause in maritime agreements.

Of course, if this were a contract involving a local transaction governed exclusively by New York law, and not a martime contract, then, provisions such as CPLR 7502(b) would be available to stay arbitration even if the dispute arose in the Federal courts. (See *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198.) The rationale underlying the decision in the *Bernhardt* case is that, regardless of whether a question under state arbitration law is classified by the state court as "substantive" or "procedural," the

Appendix C

Federal courts are to apply state aribtration law because—since it may significantly affect the result of the litigation—it is outcome determinative. (See *Guaranty Trust Co.* v. *New York*, 326 U.S. 99, 109-110, *supra;* cf. *Hanna* v. *Plumer*, 380 U.S. 460, 466-469).[1]

The difficult question arises not in actions involving wholly intrastate transactions but in those based upon contracts, sought to be enforced in the state court, which concern interstate transactions to which the F.A.A., by its own terms, applies. In those cases, the Federal courts have invoked the Federal Act to require arbitration, and preclude judicial determination, of questions not arbitrable under state law. (See *Prima Paint* v. *Flood & Conklin*, 388 U.S. 395; *supra; Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402.) In *Lawrence* (271 F. 2d 402, *supra*), for instance, the Court of Appeals for the Second Circuit held that, even though all of the other provisions in the contract may be governed by state law, the arbitration clause must be enforced in accordance with the F.A.A. regardless of the forum in which the question is

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[1] "It is therefore immaterial," the court wrote in the *York* case (326 U.S., at p. 109), "whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. • • • In essence, the intent of [*Erie R. Co.* v. *Tompkins*, 304 U.S. 64] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

raised. And, in *Prima Paint* (388 U.S. 395, *supra*), the Supreme Court held that, since the contract evidenced a transaction involving interstate commerce, it came within the coverage of the F.A.A. Rejecting the contention that, since the case was in the Federal court solely by reason of diversity of citizenship, it was "constitutionally" impermissible to apply the Federal Act, the court proceeded to stress that that statute was enacted by Congress with respect to matters—contracts involving maritime and interstate commerce transactions—over which it has incontestable legislative power (388 U.S., at p. 405):

> "The question in this case • • • is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. (See *Bernhardt* v. *Polygraphic Co.* [350 U. S.], at 202, and concurring opinion, at 208. Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. *And it is clear beyond dispute that the federal arbitration statute is based upon and confined to incontestable federal foundations of 'control over interstate commerce and over admiralty.'* H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924)." (Emphasis supplied.)

Accordingly, it was concluded, state rules allocating functions between court and arbitrator do not control. Thus, *Prima Paint* makes it clear that in an action brought in the Federal courts, which involves arbitration provisions in maritime or interstate transactions, the F.A.A. overrides inconsistent provisions of arbitration acts of

the several states. Although the Supreme Court was not called upon to determine whether the F.A.A. had to be applied in the state courts as well as in the Federal courts, we lean to the view that what was said applies equally to suits involving maritime transactions regardless of the forum in which they are brought.

In any event, though, it seems manifest that in the case before us, where the entire contract, and all of the questions involved, are solely Federal in nature, the F.A.A. must be applied even when brought in the courts of our State. In this respect, the situation herein is analogous to that in which the Federal courts find themselves when they are presented with a question of arbitrability in a wholly intrastate controversy. (See, e.g., *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, *supra.*) The Supreme Court's reasoning in that sort of case, as expressed in *Bernhardt*, is most enlightening (350 U.S., at pp. 203-204).

> "*If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought.* For the remedy of arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. • • • We said in the *York* case [326 U.S. 99] that 'The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* [304 U.S. 64] is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.' 326 U.S., at 109. There would in

> our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be." (Emphasis supplied.)

This reasoning would apply even if the Supremacy Clause did not require us to conform to, and apply, the provisions of the Federal statute. Any other conclusion, we suggest would place the court's stamp of approval on a particularly offensive form of forum shopping—as the facts of the case before us amply demonstrate. If the appellant had sought a stay of arbitration in the District Court for the Southern District of New York, it would unquestionably have been denied. Despite this, the petitioner would have us grant its petition, and deny arbitration of a question wholly unrelated to New York interests, merely because it was filed in the State Supreme Court just across the street from the Federal District Court.

A change from an arbitration panel to a law court may, the Supreme Court pointed out in the *Bernhardt* case (350 U.S. 198, 203, *supra*), make "a radical difference in ultimate result" of a contractual dispute. This being so, statutes such as CPLR 7502(b), which determine the scope of issues to be determined by the arbitrator, must—as the court held in *Bernhardt* in the converse situation there presented—be treated as "outcome determinative." Just as the Federal courts will apply the F.A.A. only to maritime and interstate transactions, where a substantial Federal interest is involved, the availability of a stay under our arbitration act must be restricted to intrastate transactions in which New York has some reasonable basis for applying its own law.

In sum, then, we would affirm the determination below even if such a result is not constitutionally mandated by the decision in *Prima Paint*. We deem it wise, indeed necessary, that a litigant in a controversy governed exclusively by Federal substantive law be not permitted to come into our courts solely for the purpose of avoiding an arbitration directed and compelled under the Federal statute.

The order appealed from should be affirmed, with costs.

• • •

Order affirmed, with costs. Opinion by Fuld, Ch. J. All concur except Burke, J., who dissents and votes to reverse on the dissenting opinion at the Appellate Division.